

THE HONORABLE THOMAS S. ZILLY

U.S. DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

STRIKE 3 HOLDINGS, LLC, a Delaware  
corporation,

Plaintiff,

vs.

JOHN DOE, subscriber assigned IP  
address 73.225.38.130,

Defendant.

JOHN DOE subscriber assigned IP  
address 73.225.38.130,

Counterclaimant,

vs.

STRIKE 3 HOLDINGS, LLC,

Counterdefendant.

NO. 2:17-cv-01731-TSZ

**DEFENDANT'S SUPPLEMENTAL  
REPLY IN SUPPORT OF  
MOTION FOR SUMMARY  
JUDGMENT AND MOTION TO  
STRIKE**

## I. INTRODUCTION

Strike 3 bears the burden of proof on Doe’s counterclaim for declaration of non-infringement. Aside from Doe’s status as the subscriber of the infringing IP address,<sup>1</sup> Strike 3 failed to produce any evidence that Doe infringed. Hence, Doe moved for summary judgment.

Strike 3 opposed Doe’s motion because it had not examined Doe’s hard drive, even though forensic examiner, Michael Yasumoto, analyzed Doe’s hard drive and concluded that it did not contain Strike 3’s movies. On reply, Doe suggested that the Court allow Strike 3 to conduct its own search of Doe’s hard drive to confirm Mr. Yasumoto’s opinion.

The Court agreed, and authorized Strike 3 to conduct a limited search for “existing and/or deleted files matching the hash values set forth in Exhibit A to the Complaint, docket no. 1.” Dkt. No. 182. After its examination, Strike 3 was authorized file a supplemental response “relating solely to the examination of defendant’s ‘imaged’ hard drive....” *Id.*

Doe offered up several dates for Strike 3 to examine the imaged hard drive but Strike 3 never scheduled the examination. Since Strike 3 chose not to examine the hard drive, there was no basis to file supplemental briefing. Strike 3 did so anyway. Dkt. Nos. 183, 184.

Strike 3’s brief attempts to completely recast the allegations in its Complaint—two years after-the-fact—providing further evidence that “Strike 3 bases its complaints on unequivocal affirmative representations of alleged facts that it does not know to be true.” *Strike 3 Holdings, LLC v. Doe*, No. CV 18-12585, 2019 WL 5446239, at \*1 (D.N.J. Oct. 24, 2019).

Strike 3’s actions are inexcusable. Doe requests that the Court strike Plaintiff’s supplemental brief and the Declaration of Patrick Paige, enter summary judgment for Doe on his remaining counterclaim, and award Doe his attorneys’ fees and costs.

## II. AUTHORITY AND ARGUMENT

### A. Relevant procedural history.

On September 19, 2019, the Court entered an order that addressed Doe’s pending

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<sup>1</sup> Subscriber status alone is insufficient to withstand a motion to dismiss, let alone sustain a copyright infringement claim through verdict. *See Cobbler Nevada, LLC v. Gonzales*, 901 F.3d 1142, 1145 (9th Cir. 2018).

1 summary judgment motion, and related discovery motions, including Strike 3's motion to  
 2 compel unrestricted access to Doe's hard drive. Dkt. No. 182. The Order authorized Strike 3 to  
 3 designate one expert to examine the "imaged" hard drive, if conducted within twenty-one (21)  
 4 days at an agreed-upon facility. Dkt. No. 182. However, Strike 3's request for unrestricted  
 5 access to the hard drive was denied. Any search would be limited to Strike 3's "existing and/or  
 6 deleted files matching the hash values set forth in Exhibit A to the Complaint, docket no. 1." *Id.*  
 7 The Order expressly prohibited Strike 3 from taking possession of Doe's imaged or original  
 8 hard drive, or from viewing any other materials on the drives. *Id.* The Court renoted Doe's  
 9 summary judgment motion and permitted the parties to file targeted supplemental briefing  
 10 "relating solely to the examination of defendant's 'imaged' hard drive." *Id.*

11 Strike 3's attorneys advised Doe "we want to proceed with the examination of your  
 12 client's hard drive" and that Strike 3's expert was "generally available." Dkt. No. 183, Exh. 1.  
 13 Doe's counsel responded with proposed dates. *Id.* Strike 3's lawyers replied, noting that their  
 14 expert was "looking into the dates." *Id.* When over a week went by without hearing from Strike  
 15 3, Doe's counsel wrote: "We have not heard back from you regarding scheduling the  
 16 examination.... Please respond." *Id.* Strike 3 replied, in relevant part: "[T]he hash values listed  
 17 in Exhibit A to the Complaint (Dkt. 1) are not hashes for the movie files themselves...." *Id.*

18 Strike 3's email came as a shock because the Complaint alleged the exact opposite.  
 19 Exhibit A was the evidence, and "the file hash correlating to each file matched the file hash  
 20 downloaded by Defendant." Dkt. No. 1 at ¶¶ 25-26. In no uncertain terms, Strike 3 explained  
 21 that "[t]he entirety of the digital media file ... has a unique cryptographic hash value ('file  
 22 hash'), which acts as a digital fingerprint identifying the digital media file (e.g. a movie)."  
 23 "Once infringers complete the downloading of all pieces which comprise a digital media file,  
 24 the BitTorrent software uses the file hash to determine that that the file is complete and  
 25 accurate." *Id.* at ¶ 22. Strike 3 accused Doe directly, alleging that "Defendant downloaded,  
 26 copied, and distributed a complete copy of Plaintiff's Works without authorization." *Id.* at ¶ 27.  
 27

1 Doe directed Strike 3 to these allegations and asked Strike 3 to pick an examination  
2 date. Dkt. 183, Exh. 1. Strike 3 never replied, and the examination deadline came and went.

3 **B. Strike 3’s Complaint never stated a claim for relief against anyone, let alone Doe.**

4 The term “hash” refers to the use of a mathematical “hash function” using a file, text, or  
5 any other data as input. One type of “hash function” is a “SHA1 hash”. This algorithm  
6 produces a 40-character hexadecimal value like the ones listed in Exhibit A to the Complaint.  
7 *See* Declaration of Michael Yasumoto in Support of Defendant’s Supplemental Reply, at ¶ 4.

8 A “file hash” can be used to uniquely identify a file and acts like a digital fingerprint.  
9 *Id.* ¶ 5. When the “file hash” of a file located on storage media matches the hash of a reference  
10 file, the file hash can be considered evidence of infringed works. *Id.* ¶ 6. For this reason, it is  
11 best practice in computer forensics to calculate the hashes of the files on a storage device and  
12 then compare them against a target set in an infringement case. *Id.*

13 “Info-hashes” are different from file hashes. They carry limited forensic value because  
14 they are not calculated from the infringing work itself. *Id.* ¶ 10. As Strike 3 concedes (Dkt. No.  
15 183, fn 1), info-hashes may help identify infringing files using a Google search, but they would  
16 not show that a defendant possessed all of a media file (as a file hash would). Yasumoto, ¶ 10.

17 Until a few days ago, Strike 3 consistently represented that the hashes in Exhibit A were  
18 file hashes. *See* Dkt. No. 1 at ¶¶ 22-27. Strike 3’s investigator, Tobias Fieser, reiterated this  
19 point in his declaration when he testified that “IPP’s software determined that the files being  
20 distributed by Defendant’s IP Address have a unique identifier of the Cryptographic Hash  
21 outlined on Exhibit A.” Dkt. No. 4-3, ¶ 10. Now, two years into the litigation, Strike 3 admits  
22 that the hashes upon which its entire case hinges are not complete digital files after all. In truth,  
23 the hashes in Exhibit A do not prove that Doe (or anyone else) downloaded copies of its films.

24 **C. The Court should strike Plaintiff’s supplemental response as moot.**

25 The Court’s September 19, 2019 Order was clear. Strike 3 could search the imaged hard  
26 drive for the hashes listed on Exhibit A, which Strike 3 alleged represented full copies of Strike  
27

3's films. Once Strike 3 completed the search, it could file a brief "relating solely to the examination of defendant's 'imaged' hard drive." Strike 3 chose not to examine the hard drive. As a result, any written response from Strike 3 is moot and should be stricken. Likewise, if Strike 3 was concerned about the scope of the examination described by the Court's order, it could have moved for reconsideration, but Strike 3 chose not to do so. Finally, Strike 3 never made any meaningful effort to meet and confer with Doe. *See* Dkt. No. 183, Exh. 1.

**D. The Court should strike the untimely declaration of Patrick Paige.**

Courts will strike untimely expert declarations, and particularly those that purport to introduce new methodologies that do not appear in their expert reports. *Somerlott v. McNeilus Truck & Mfg. Inc.*, No. C16-789-MJP, 2017 WL 6459039, at \*2 (W.D. Wash. Dec. 18, 2017) (striking expert declaration as untimely because it attempted to explain a methodology that "was not included in either his expert report or his deposition testimony"). The Declaration of Patrick Paige should be stricken for three reasons. First, the declaration is an improper rebuttal report. Strike 3 had ample opportunity during discovery to rebut Mr. Yasumoto's opinion but chose not to do so. Second, Strike 3 already addressed Mr. Yasumoto's report on summary judgment, where Strike 3's only objection was his reliance on hearsay, an objection that rings hollow under Rule 703. Finally, the Court should strike Paige's declaration because it purports to introduce a new methodology two years into the litigation. The methodology Paige proposes never appeared in any expert report produced and he did not testify about it in his deposition. Until a few days ago, Strike 3 had never asked Paige to prepare an expert report for this case. Dkt. No. 175-16 at p. 7. Instead, Strike 3 produced reports Paige wrote for other cases in 2013 and 2016, neither of which address the question of how he would examine Doe's hard drive. Dkt. No. 175-13. The Court should reject Strike 3's attempt to introduce new opinions now.

### III. CONCLUSION

Based on the foregoing, and his prior filings (Dkt. Nos. 174, 175, 176, and 181), Doe requests that the Court grant him summary judgment and award him his fees and costs.

1 RESPECTFULLY SUBMITTED AND DATED this 1st day of November, 2019.

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CERTIFICATE OF SERVICE

I, Adrienne D. McEntee, hereby certify that on November 1, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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